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Special Articles

A Perplexing Situation

IN April last the Dominion Government passed an Order-in-Council, which was approved by resolutions of the Senate and House of Commons, cancelling the exemptions that had previously been allowed by the tribunals under the Military Service Act to a class of young men, who were thereupon called on to report for military duty. Accepting the Government's view that an additional force was urgently required, and that the special effort proposed was necessary, we nevertheless expressed regret at the form which the proceedings had taken. We quote from our comments at that time:

> "To the method employed in the passing of this legislation there may be perhaps well grounded objections. The usual form of introducing a bill, to pass its several readings, was not adopted. Instead the new measure was prepared in the form of a draft Order-in-Council, to be made effective at once on the approval of the form by Parliament. The reason for this, of course, was the desire to take quick action, and probably there was a fear that procedure in the more regular form would meet with obstruction. The course of the debate on the resolution seems to show that this fear was not warranted. The debate was, for the importance of the question, a very short one. The Opposition members were content to have a general statement of their objections made by their leader, and then to record their votes without further delay. There is no reason to doubt that a bill in the regular form would have received similar treatment, for the Opposition members appear disposed to accept the verdict of the country, which is the sensible thing to do. It would have been better, for the sake of precedent, to have pursued the usual course rather than the exceptional one."

There is now some reason to believe that, not only for the sake of precedent but also for the sake of legality of procedure, it would have been better to have followed the usual method of enacting laws.

The Supreme Court of Alberta (the Chief Justice dissenting) has given a decision to the effect that exemptions granted by the tribunals under an Act of Parliament—the Military Service Act—cannot be cancelled by anything less than an amending Act; that mere resolutions of the Senate and House of Commons are not an Act, and that consequently the Order-in-Council is null and void. It is a case in which, from the court's point of view, the form of procedure is vital. The passing of an Act requires the co-operation of the King, represented by the Governor-General, the Senate, and the House of Commons. The form of an Act is this: "His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows." The three enacting powers, the King (represented by the Governor-General), the Senate and the House of Commons, all appear in the steps taken to give effect to the Government's action. The Governor-General is necessarily a party to the passing of an Order-in-Council, since the document would have no value without his signature. Both the Senate and the House of Commons by resolution approved of the proposed Order-in-Council. But while there were thus in the transaction all the elements necessary for the passage of an Act, the form which the proceedings took fell short of producing an Act, and for that reason, in the opinion of the Alberta court, the Order was null and void. All the elements of a fabric were there, but they were not properly woven. To enact a law it is necessary to introduce a bill, have it pass its first and second readings, at each of which its provisions may be debated; then it must pass through a committee of the whole House, at which stage its most minute details may be discussed; then it must pass a third reading, at which it may be further debated; then it must pass through a similar process in the Senate; and finally it must receive the sanction of the Governor-General, publicly expressed from his seat in the Senate Chamber. In this case no bill was introduced. The form of the proposed Order was laid on the table of each House and was approved in both by resolution. Parliament, in its willingness to support the Government in war measures, consented to an entire absence of the checks and guards which the wisdom of ages had provided to prevent hasty legislation. The result is that we have an Order-in-Council which, while it has the moral sanction of the Canadian Parliament, in the opinion of the Alberta court it has not the kind of sanction which is necessary to give it the authority of law. According to this decision the exemptions granted by the tribunals under the Military Service Act have not been cancelled by the Order-in-Council, but remain, and the young men exempted cannot be called out for service.

In Montreal, Mr. Justice Bruneau has given a decision which, though arising from another phase of the question, has a similar effect, inasmuch as it treats the Order-in-Council as illegal. Here the point raised was not the insufficiency of the resolutions of the Senate and House of Commons, but the power of the Dominion Parliament by any procedure to suspend the operation of the Habeas Corpus Act. The Order-in-Council professed to override that ancient and honorable piece of British law. Against this pretension it was argued that the Habeas Corpus Act was not one of the matters coming within the jurisdiction